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No. 71-23

In the Supreme Court of the United States

OCTOBER TERM, 1970

IN RE JOHN ALEXANDER WOMACK and JAMES ANDREW ROBINSON, Witnesses Before the Special February 1971 Grand Jury, Northern District of Illinois, Eastern Division,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Memorandum of the United States in Opposition to the Petition for Certiorari heretofore filed herein is, at least, truncated, if not perfunctory.

The essence of the Government's Memorandum opposing the grant of Certiorari is:

I. Repeals by implication are not favored, and

II. The Petitioners have no basis for complaint because the *immunity given* them under the old statute (18 U.S.C. 2514) was broader than that given under the new (18 U.S.C. 6002).

I.

Under this Point, the Government relies exclusively on certain statements by this Court in *United States* v. *Borden Co.*, 308 U.S. 188, and particularly at page 198. But they seem to have overlooked the rationale of this Court's decision in that case. Indeed, their own argument contradicts that rationale. In the *Borden* case, the Capper-Volstead Act gave the Secretary of Agriculture the power to enter into agreements regulating, supervising and controlling the milk industry in order to maintain orderly marketing conditions and to stabilize the purchasing power of agricultural commodities. It was the position of the defendants in that case that the pervasiveness of the Act was such as to repeal by implication the operation of the Sherman Anti-Trust Act in the dairy field. This Court held that, to the extent that the later Act collided with the plenary application of the Sherman Act, the Sherman Act was delimited. This is clear from the express language of this Court.

> "That the field covered by the Agricultural Act is not coterminus with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.
>
> * * *
>
> "These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should

operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

"An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go."

U. S. A. v. *Borden Co.*, 308 U.S. 188, 200, 201-2.

As we view the clear import of this decision, it says the Sherman Act is not repealed by law because the later Act —Capper-Volstead—did not cover the whole aspect of the Sherman Act. *But*, insofar as Capper-Volstead did invade the purview of Sherman, Sherman was, by operation of law, repealed.

Applying those principles, 18 U.S.C. §2514 definitely was delimited in its entirety by 18 U.S.C. §6002, for §6002 has greater application than does §2514, and includes every field in which §2514 was applicable. Further, the repealing provision (Section 227 of the Organized Crime Control Act of 1970) which repeals §2514 in its entirety to be supplanted by §6002 exclusively—though in the future—demonstrates a recognition that the later Act was intended to preempt the entire field.

We submit, as we did before, that §6002 by operation of law nullifies §2514, and the case upon which the Government relies, the *Borden* case, logically applied, supports that conclusion.

II.

The essence of the Government's argument under this Point is that given the alternative of the restraint on your liberty without bars as opposed to a restraint on your liberty with them, the former is more palatable. It is amazing to the writer—an admitted adult of the World War II era—that our philosophy of Government has apparently so changed. Is it a scant twenty-five years ago that we considered a Government that required father to confess upon son, son upon father, friend upon friend, so abhorrent that we must take up arms to have it obliterated from the face of the earth? Has the philosophy of this country so changed that a "free pass" satisfies the constitutional intendments, under the same Constitution? We think not! So conservative a newspaper as the Wall Street Journal noted the frightening progress of this new philosophy.

> —critics say the chief victims so far have been witnesses who have been held in contempt of court for refusing to testify before the juries.
>
> *Contempt Proceedings on Rise*
>
> Under federal rules, a witness who is granted immunity from prosecution and still refuses to testify can be jailed on contempt charges for as long as the grand jury is sitting—up to 18 months, in some cases—or until he agrees to testify. The number of contempt sentences meted out by courts overseeing grand jury proceedings isn't known—the Justice Department says it doesn't keep such figures—but most observers agree there has been a definite increase in contempt proceedings.
>
> Wall Street Journal, July 29, 1971, page 1.

It is our contention that the immunity statutes are valid, so long as they are not compulsory. It would be foolish not to recognize the position of informers in effective law enforcement, their history dating back hundreds of years, indeed thousands. It is our position that it should be their (the informer's) decision. To give to the Executive the right to immunize to secure informers' testimony is one thing, a bargaining principal available to one receptive to bargaining. To extract the citizen from his privacy under threat of jail is another. To condemn him to jail for failing to relinquish his privacy sets us back twenty-five years and puts us in the odious historical niche of our erstwhile opponents.

CONCLUSION

Wherefore, for the above and foregoing reasons, these petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.